

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMCOR FLEXIBLES, INC.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 11-0033
	:	
COMMONWEALTH EDISON COMPANY,	:	
	:	
Respondent.	:	
	:	
Complaint pursuant to Sections 9-250 and	:	
10-108 of the Illinois Public Utilities Act	:	
(220 ILCS 5/9-250 and 220 ILCS 5/10-108)	:	
and Section 200.170 of the Rules of Practice	:	
(83 Ill. Adm. Code 200.170).	:	

**AMCOR’S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE AND FOR SANCTIONS**

Amcor Flexibles, Inc. (“Amcor”) filed its Motion to Strike and for Sanctions (the “Motion”) because Commonwealth Edison Company (“ComEd”), in its briefing on the motions for judgment on the merits of this matter, repeatedly made factual assertions that have no basis in the record. ComEd spends the bulk of its 20-page Response to the Motion (the “Strike Response”) re-arguing the case rather than responding to the Motion. This is apparently preferable to explaining its failure to follow the Commission’s rules. None of ComEd’s arguments, however, are valid. The Commission should strike the portions of ComEd’s Response to Amcor’s Motion for Judgment (the “Response”) and its Reply in Support of its own Motion for Judgment (the “Reply”) that are improper, as identified in the Motion.

**ComEd Violated the Commission’s Rules
By Asserting “Facts” in its Briefs that
Have No Support in the Record**

Amcor’s Motion expressly stated that “ComEd’s Response and Reply contain numerous factual assertions that have no support in the record and therefore constitute arguments by

lawyers rather than sworn or agreed-upon evidence.” Motion at p. 4. Amcor’s Motion noted that these assertions violated 220 ILCS 5/10-103 (requiring Commission decisions to be based exclusively on the record), and that most of them also violated 83 Ill. Adm. Code 200.800 (requiring briefs to contain citations to the record). Motion at pp. 3-4. Amcor’s Motion then identified the specific portions of ComEd’s Response and Reply that violated these rules. *See* Motion, Exhibits A and B. Finally, the text of the Motion referenced and discussed 28 specific improper statements. *See* Motion at pp. 4-7.

ComEd argues that neither it nor the Commission can determine what is wrong with the improper statements in its Response and Reply. Strike Response at pp. 3 and 15. This purported confusion is disingenuous. To begin with, ComEd has no trouble identifying the issues Amcor has raised when ComEd feels like doing so; for instance, ComEd’s Strike Response attempts to address each specific objectionable statement identified in the Reply. Strike Response at pp. 16-18. Amcor responds point-by-point to ComEd’s comments in Exhibit A.

Further, the Motion clearly identifies (in the exhibits) exactly which statements are objectionable; it clearly identifies why (because they are not based on admissible evidence in the record); and the text of the Motion discusses the specific defects of almost all of ComEd’s improper statements. There is no real confusion as to what ComEd has done or why its briefs are improper and objectionable.

The Record Does Not Support Even ComEd’s Weak
Excuse For Not Adequately Testing The Meter Pre-Installation.

The Stipulation clearly states that, prior to installation, ComEd tested only whether the Replaced Meter sent test pulses to the “optiport,” and that ComEd did not test whether the Replaced Meter would provide accurate information to a meter reader when read. *See* Stipulation, ¶¶ 34-35. The Motion identifies eight specific instances in ComEd’s Response and

Reply where ComEd asserts that it programs meters after it tests them, and why. Nothing in the record supports these allegations.¹ Even ComEd itself now admits: “Perhaps, ComEd could have programmed the Replaced Meter before testing for accuracy.” Strike Response at p. 8. Of even more consequence, ComEd expressly admits that its claim that it tested meters before programming them “was not a fact of record.” Strike Response at p. 21. These statements should be stricken.

ComEd rationalizes this attempt to expand the record by arguing that its claim “was of absolutely no relevance to the issues at hand” and that these facts are “common sense.” Strike Response at pp. 6 and 21. To begin with, common sense leads to precisely the opposite conclusion; since ComEd is required to determine if a meter was accurate, common sense dictates that ComEd test the meter *after* programming to confirm that it provides accurate information when read. In addition, ComEd’s statements bear no relationship to any facts in the record; they are not attempts at making a good faith inference from record facts. ComEd cannot defend making up facts out of whole cloth with a blithe assertion that they are “common sense.” Further, while ComEd’s admission that these “facts” are irrelevant may be refreshing, that does not excuse ComEd’s attempt to inject them into the case eight separate times.

The balance of ComEd’s explanation as to why it made these unsupported allegations just re-argues the merits of the case and has nothing to do with its improper attempt to assert “facts” in its briefs that are not in the record. In particular:

- ComEd quibbles with the statement in the Stipulation that ComEd failed to test whether the information the Replaced Meter provided to meter readers was accurate.

¹ It appears that ComEd makes these “factual” claims to provide an excuse for failing to test whether the information the meter reports to meter readers is accurate. If so, it is not much of an excuse—even ComEd admits it could have tested the Replaced Meter after programming it. This is particularly true since ComEd has an obligation—not an option—to test the meter for accuracy prior to installation. ICC Rule 410.160.

Strike Response at p. 5. The Stipulation specifically states, however, that ComEd tested only whether the Replaced Meter sent proper test pulses. Stipulation, ¶ 34.

Paragraph 35 of the Stipulation states that ComEd failed to confirm that the Replaced Meter sent accurate information to the billing memory, and that ComEd did not verify that the information sent to a meter reader would be accurate. The record is clear.

- ComEd complains that the Motion does not explain why ComEd was legally obligated to test whether the Replaced Meter was sending accurate information to a meter reader. Strike Response at pp. 5-6, 7. In the briefing on its Motion for Judgment, Amcor indeed explained in detail why, to test whether a meter is accurate pursuant to ICC Rule 410.160, ComEd would need to determine that the meter provided accurate information when read—after all, what is the purpose of a public utility meter except to provide accurate information to a meter reader, and why would a meter need to be accurate except to provide accurate information for billing when read? Amcor’s Motion for Judgment at pp. 6-7; Amcor’s Reply in Support of its Motion for Judgment at pp. 4-7. However, the Motion to Strike—which is concerned with ComEd’s repeated attempts to assert facts not in the record—does not need to address this issue.
- ComEd persists in going outside the factual record in this case, repeating its unsupported, unsworn assertion that “[R]egardless of when a meter would be programmed, the standard accuracy tests of the Commission’s rules simply would not detect a programming error.” Strike Response at p. 6; *see also* Strike Response at pp. 7-8 (Paragraph Nos. 4 and 5), 8 and 21. ComEd’s repeated assertions of this supposed “fact” (which is not accurate) are simply additional, intentional violations of

the Commission's rules. *See* below. These statements should be stricken from ComEd's Strike Response.

- ComEd implies that this issue arose because it inadvertently failed to cite Paragraph 36 of the Stipulation. Strike Response at p. 7. Paragraph 36 of the Stipulation, however, describes testing that ComEd allegedly performed in 2009, four years after installation of the Replaced Meter. It has nothing to do with this issue.

ComEd Has No Support for its Counterintuitive Assertions Regarding Diagnostic Tests

Amcor's Motion identified 11 separate times that ComEd purported to provide information about "diagnostic" tests that was not in the record and/or asserted that only a "diagnostic read," and not an accuracy test, could determine that the Replaced Meter was providing inaccurate information to meter readers. Motion at p. 5. ComEd's Strike Response makes a similar assertion four times. Strike Response at pp. 6, 7-8, 8 and 21; *see* above. There is nothing even remotely similar to this allegation in the Stipulation. These statements should be stricken from the Response, the Reply and the Strike Response.

At times, ComEd appears to argue that, because it did not discover the meter error until Mr. Rumsey's "diagnostic examination" in 2009 (Stipulation, ¶ 36), only that test and no other could have found the meter error. *See*, for example, ComEd's Strike Response at pp. 7-8. This leap is supported by neither logic nor the record.² Paragraph 36 of the Stipulation, repeatedly cited by ComEd, makes no such claim; it only describes the tests Mr. Rumsey performed in 2009. If one does make a leap, once again common sense points the other way. If ComEd can

² ComEd argues without support that Amcor has the burden of proving that ComEd could comply with the Commission's regulations. Strike Response at p. 11. Amcor, however, obviously does not have the burden to disprove ComEd's supposed excuses for violating the Commission's regulations. Further, ComEd did not raise those excuses in the pleadings or in the factual record.

run a set amount of power through the meter and then insert a probe in the optiport to determine whether the meter generates the correct number of test pulses, it presumably can follow the same procedure and read the meter to determine whether it generates the correct number of billing pulses.³

ComEd also argues that its “background information” is relevant. Strike Response at p. 9. While ComEd’s allegations are marginally relevant at best, the point is: (a) ComEd’s supposed background information is not part of the record in this case, (b) they are just unsworn arguments put forth by non-expert lawyers, and (c) the Commission can only decide matters based on the record, not on legal briefs that have no support the record.

Finally, ComEd resorts to semantics that are unrelated to its improper and unsupported factual allegations. For example:

- ComEd asserts with no explanation that “A diagnostic is not an accuracy test. It is, as Mr. Rumsey set out in his undisputed testimony, a diagnostic ‘examination.’” Strike Response at p. 9 (Paragraph 1); *see also* Strike Response at p.10 (“The diagnostic read that Mr. Rumsey performed on the Replaced Meter – is not a ‘test.’ It is certainly not a ‘test’ under the Commission’s rules.”). No facts in the record support this purported distinction, and simply stating without support that words do not mean what they ordinarily mean does not give ComEd carte blanche to expand the record. Further, the statements ComEd seeks to strike are not argument about what the Commission’s regulations mean, but unsupported factual statements about what tests can determine.

³ In any event, ComEd must comply with the Commission’s regulations regardless of the label it chooses to affix to its particular testing procedure, and this was the purpose of Amcor’s reference to the Commission’s regulation at 83 Ill. Adm. Code Section 410.140(a).

- ComEd asserts that “providing accurate information to meter readers” is not an issue in this proceeding. Strike Response at p. 9 Paragraph 2; *see also*, Strike Response at p. 11). Amcor has previously addressed this argument on the merits (*See* Reply in Support of Motion for Judgment at p. 7); it contradicts ComEd’s contemporaneous correspondence and the plain and ordinary meaning of the words at issue in this matter. For this Motion, however, ComEd’s argument has no relevance.

ComEd’s Purported Explanation of How
The Dispute Arose is Inadmissible Hearsay.

In the Motion, Amcor noted how ComEd repeatedly and improperly cited its own self-serving correspondence as evidence of how the dispute between the parties arose. Motion at p. 6. While the origins of the dispute do nothing to determine whether ComEd complied with the Commission’s testing regulations (Rules 410.155 and 410.160, among others), the problem for purposes of the Motion is that the Stipulation does not provide any admissible facts regarding the origins of the dispute. Instead, the parties expressly agreed that the correspondence was sent, but also expressly stated that the accuracy of the statements in the correspondence was not agreed. Stipulation, ¶¶ 17 and 19. The contents of the correspondence are classic hearsay—out of court statements used to prove the truth of the matter asserted. Illinois Rule of Evidence 801(c).

ComEd again responds with a variety of unfounded arguments. First, it argues that the origins of the dispute are relevant. Strike Response at p. 11-12, and 13 (Paragraph 5). While the relevance of this is debatable (these supposed “facts” certainly have no impact on the outcome of the case), relevance is not the issue—the absence of evidentiary support for these “facts” is the issue.

ComEd also argues that Amcor cited the wrong paragraph of the Stipulation (*i.e.*, Paragraph 19 rather than Paragraph 17) when noting that the parties had agreed that the

correspondence was sent, but expressly not agreed that the statements made in the correspondence were true. Strike Response at pp. 12, 13, and 20-21. Since both Paragraph 17 and Paragraph 19 of the Stipulation contain the identical language in this regard, ComEd's point has no significance.

ComEd argues that Amcor never specified which parts of the correspondence it disagreed with, or put forth contrary evidence. Strike Response at 12-13. ComEd has matters precisely backwards. ComEd has an obligation to argue only facts that are supported by admissible evidence. Amcor obviously does not have an obligation to specify what inadmissible evidence it disputes, or to provide counter-evidence to dispute inadmissible evidence.

Finally, ComEd makes the only argument that addresses the issue at hand, even if it is still wrong: ComEd contends that the correspondence is a business record pursuant to Illinois Supreme Court Rule 236(a). Strike Response at p. 14. The problem is that the admissibility of a business record requires a factual foundation that is not contained in the record. In particular:

- There is no evidence that the correspondence, sent to demand payment from Amcor, was "made as a memorandum or record" of the origins of the dispute. Indeed, it appears on its face to simply demand payment of money.
- There is no evidence that the explanation of the origins of the dispute in this correspondence was "made in the regular course of any business."
- There is no evidence that "it was the regular course of the business" to create correspondence summarizing the origins of the dispute.
- There is no evidence that "it was the regular course of the business" to create the correspondence "at the time of" the origins of the dispute "or within a reasonable time thereafter."

ComEd has failed to provide facts demonstrating that the correspondence constitutes a business record. The statements in the correspondence, which the Stipulation makes clear are not agreed, are inadmissible.

ComEd's Purported Explanation of the Purpose of Scaling Factors has no Support in the Record

The Motion noted five separate times in the Response where ComEd purports to discuss the differences between “transformer-rated meters” and “self-contained meters.” Motion at p. 6. The relevance of this “background” information is not clear—Amcor guessed that ComEd just wanted to show that its error here was easy to make (Motion at pp. 6-7), and ComEd did nothing in the Strike Response to explain any other relevance of the statement. *See* Strike Response at p. 15. Providing an excuse for making the mistake with the Replaced Meter, however, does nothing to excuse ComEd's failure to test the meter to find the mistake, as required by ICC Rules 410.155 and 410.160. But, again, relevance is not the issue here—ComEd's assertions (Strike Response at pp. 15-16) that these allegations are “informative” or provide “context” (although ComEd never says how) do not mean that there is a factual basis for them in the record. There is none, and that is why Amcor moved to strike them.

ComEd also argues that Amcor's objections only relate to statements that the Replaced Meter was a transformer meter. Strike Response at 14. This is simply wrong. Amcor's objections relate to ComEd's attempts to compare and contrast transformer meters with self-contained meters, and its assertions that each meter type is associated with a different scaling factor. *See* the Motion at 6 (citing ComEd's Response at pp. 5, 5-6, 6, 7 and 12). Tellingly, ComEd does not even attempt to provide support in the record for these statements.

ComEd's Complaint that Amcor Should Have Filed the Motion to Strike Sooner Lacks Merit

Amcor did not file this Motion lightly because, unfortunately, it creates collateral litigation. Indeed, in connection with the Motion in Limine, Amcor did not file its Motion to Strike until after ComEd had filed three separate affidavits that not only went outside the Stipulation but also asserted facts wholly unrelated to the dispute at hand—Amcor had hoped that simply objecting in its pleadings would cause ComEd to stop filing ever-longer and increasingly improper affidavits. Here, in its Reply in Support of its Motion for Judgment, Amcor specifically objected to ComEd’s allegations of facts that were not supported by the Record. Amcor’s Reply in Support of Motion for Judgment at p. 6 (discussing ComEd’s alleged excuse for failing to test whether the Replaced Meter read accurately) and p. 7, footnote 6 (discussing ComEd’s allegations about diagnostic vs. accuracy tests). Amcor hoped that perhaps ComEd would recognize that it had strayed from the record and correct its errors on its own. But ComEd did just the opposite, doubling down and repeating most of its unfounded, unsworn factual allegations in its next pleading, ComEd’s Reply. Amcor had no choice but to file this Motion to clear up the record given ComEd’s repeated misconduct.

ComEd now complains that Amcor should have filed its Motion to Strike sooner. Strike Response at pp. 15-16.⁴ ComEd cites no prejudice from Amcor’s decision to first try to raise ComEd’s improper “factual” assertions in briefing, because there is none. ComEd cites no rule saying that, if it asserts facts without proof in its briefs, its failure to follow the Commission’s rules is excused if not immediately subject to a motion to strike—because there is no such rule. Rather, the Illinois Public Utilities Act states unequivocally, and without exception, that the Commission must base its decisions on the written record (220 ILCS 5/10-103), and the

⁴ ComEd’s position now is particularly ironic given the avalanche of pleadings it filed in connection with Amcor’s Motion in Limine after oral argument of that motion was complete.

Commission's Rules require without equivocation or exception that parties cite to the written record when they make factual claims in their briefs. Rule 200.800.

ComEd's Intentional and Contumacious
Conduct Should Be Sanctioned

ComEd has repeatedly sought to make factual allegations in this proceeding that are without any basis in the record. First, in connection with the Motion in Limine, Amcor was forced to file a Motion to Strike after ComEd filed improper affidavit after affidavit; ComEd's response to Amcor's objections was to file even longer affidavits. Amcor's first Motion to Strike (which did not ask for sanctions) was granted.

ComEd repeated its improper conduct in the briefing on the merits. Indeed, ComEd has repeated its unsworn and unsupported "factual" allegations even in its response to this Motion. *See* Strike Response at pp. 6; 7-8 (Paragraph Nos. 4 and 5), p. 8 and p. 21. In response to this Motion, ComEd does not cite the record to support its "factual" allegations about when it tests meters and why. It does not cite the record for its assertions about what types of tests can determine whether a meter reports accurate information when read. Nor does it cite the record for its discussion of the purported differences between types of meters. Further, for its allegations regarding the origins of this dispute, ComEd only points to inadmissible hearsay—and then claims the hearsay is admissible by making additional factual allegations that are not in the record.

ComEd's primary explanation for why its conduct is not contumacious seems to be that its improper, unsworn factual allegations were "background," were not "legal facts of consequence to the decision," or were only intended to put the facts "into perspective." Strike Response at p. 18. ComEd also claims that Amcor has not shown prejudice from ComEd's

repeated attempts to assert “facts” in its briefs that have no basis in the record. Strike Response at pp. 17-18. This is no defense; the Commission’s rules do not provide that only the facts ComEd deems important must have support in the record. Further, ComEd obviously thought it was gaining some advantage from putting forth these allegations.

For reasons that are not clear, ComEd also references its own Motion to Strike (made in connection with Amcor’s Motion in Limine). Strike Response at p. 19. To begin with, ComEd’s Motion to Strike lacked merit and was denied. Further, it has no relationship to this Motion or to Amcor’s first Motion to Strike, which was directed at ComEd’s attempts to reference irrelevant facts that were outside of the agreed-upon record. Contrary to ComEd’s statement in its Strike Response, Amcor’s first Motion to Strike was granted in full, not in part.

ComEd also argues that the Commission can determine for itself what facts are contained in the Stipulation, and what factual allegations in the briefs are not. Strike Response at p. 20. The Commission should not have to shoulder such a burden, which is the entire point of Rule 200.800 requiring citations to the record. Further, contrary to ComEd’s assertions (Strike Response at p. 20), the unsworn unsupported “facts” that ComEd has alleged are not argument—they are not legal positions, or good faith inferences drawn from existing facts. They are simply made up “facts” that have no basis—several of them are even counterintuitive on their face.

ComEd’s misconduct is repeated and intentional. ComEd was undeterred by the granting of Amcor’s first motion to strike. This tribunal should not be required to spend time and effort repeatedly cleaning up the record and addressing ComEd’s refusal to comply with most basic rules. Only sanctions can (hopefully) deter ComEd’s continued misconduct.

WHEREFORE, Amcor respectfully requests an Order that:

1. Strikes the portions of ComEd's Response identified in Exhibits A and B to the Motion to Strike from the record in this case;
2. Strikes the improper portions of the Strike Response identified herein (Strike Response at pp. 6, 7-8, 8 and 21);
3. Awards Amcor the attorneys' fees it has incurred and will incur in connection with this Motion; and
4. Grants Amcor such further relief as is appropriate.

AMCOR FLEXIBLES, INC.

Date: December 11, 2012

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Attachments:
Attachment A